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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

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NOV 20 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Closed Captioning and Video Description of Video Programming	)	MM Docket No. 95-176
	)	
	)	

To: The Commission

RESPONSE OF THE A&E TELEVISION NETWORKS

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SUMMARY

The Telecommunications Act of 1996 (the "Act"), in its text and history, required the Commission to reduce the burdens of captioning regulations when they might threaten the viability of particular networks or programming. In the *Order* issued by the Commission in this proceeding, the Commission confirmed that new networks deserve protection from the burdens of captioning until they have had an opportunity to develop their programming and audience base. As several petitions for reconsideration have noted, however, the Commission did not explain why it did not grant new networks the same effective transition period that all other networks have to conform to mandatory captioning requirements. In contrast with established networks, new networks can expect their captioning requirements to skyrocket as soon as their limited exemption expires. After finding, on the one hand, that new networks deserve of protection, the Commission should not, with the other hand, take away that protection by refusing to grant new networks the transition period given to all other non-exempt programmers.

For similar reasons, the Commission should extend the current exemption for new networks from four to five years, because, as demonstrated throughout the record in this proceeding, a typical new network takes almost five years to break even *without* the additional costs of captioning. The Commission's decision to grant only a four-year exemption was not justified in the *Order* and is insufficient.

The Commission also should recognize that its abrupt shift from percentage benchmarks during the transition period to absolute hour requirements

undermines the balancing approach of the rest of the *Order*. Under the current hour requirements, a network that airs mostly classic programming -- which is supposedly subject to less demanding captioning requirements -- still is obligated to caption as many hours of programming as a network that can afford all new programming (up to the 95 percent ceiling). This approach substantially denies the protection that the Commission intended to grant vintage programming (and its programmers). Consequently, the Commission should restore the percentage benchmarks proposed in the *Notice* in this proceeding and at least implicitly endorsed by the majority of the commenters.

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A&E Television Networks (including the A&E Network and The History Channel) ("AETN"), through its attorneys and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, hereby respond to Petitions for Reconsideration filed in response to the *Report and Order* 1/ in the above-captioned proceeding (the "*Order*"). 2/ AETN is a cable programmer that is neither owned nor

1/ *Closed Captioning and Video Description of Video Programming, Report and Order*, MM Docket 95-176, FCC 97-279 (released Aug. 22, 1997) (the "*Order*"). The *Order* promulgates a series of captioning requirements (the "Captioning Rules"), which differ in a number of respects from the regime the Commission proposed in an earlier notice. *See Closed Captioning and Video Description of Video Programming, Notice of Proposed Rulemaking*, FCC 97-4 (released Jan. 17, 1997) (the "*Notice*"). In response to the *Notice*, A&E submitted comments highlighting relevant issues of particular concern for the Commission (the "A&E Comments").

2/ The following entities submitted Petitions for Reconsideration: Outdoor Life Network, L.L.C. ("Outdoor Life"), the Game Show Network, L.P. ("GSN"), Association of Local Television Stations ("ALTV"), NIMA International ("NIMA"), National Association for the Deaf ("NAD") and Consumer Action Network ("CAN") (jointly), Self Help for Hard of Hearing People, Inc. ("SHHH"), Encore Media Group, Association of America's Public Television Stations, and Wireless Cable Association International, Inc. NIMA controlled by any cable operator. The A&E Network features critically acclaimed original entertainment programming, including the series BIOGRAPHY®, mysteries, dramatic programs and specials, as well as offering an innovative educational service, *A&E Classroom.* The History Channel, which was launched on January 1, 1995, provides viewers historical documentaries, movies and miniseries placed in historical perspective.

AETN commends the Commission's attempt in the *Order* to follow the intent of Congress by weighing the potential benefits of captioning requirements against the needs of programmers striving to bring the entire American public diverse and innovative programming. However, as some of the petitioners pointed out, the *Order* and the new Captioning Rules do not adequately safeguard certain types of programming that the Commission found deserving of protection. Accordingly, AETN joins Outdoor Life and GSN, among other petitioners, in requesting a few critical revisions. Other Petitioners disregard the careful balance Congress struck in Section 713 and demand that the Commission increase the captioning requirements. AETN respectfully opposes the petition for reconsideration filed by SHHH and the joint petition for reconsideration filed by NAD and CAN.

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also submitted a request for a stay of the *Order* and the Captioning Rules pending reconsideration.

I. THE STATUTE, LEGISLATIVE HISTORY, THE RECORD, AND THE REASONING OF THE *ORDER* ITSELF SUPPORT REVISIONS TO THE CAPTIONING RULES.

A. The Statute, Legislative History and Record

The Telecommunications Act of 1996 (the "Telecom Act"), through what was later codified as Section 713 of the Communications Act, directed the Commission to give due regard to the impact of captioning obligations on programming networks in devising requirements for the captioning of programming. 3/ Section 713 expressly codified the Commission's historic approach of recognizing how regulatory burdens should be adapted to different programming services operating in different economic contexts. Thus, while Sections 713(b) and (c) empowered the Commission to establish rules for captioning to be included in video programming, and to implement an "appropriate schedule" for compliance, subsection (d) established a series of exemptions. In particular, Section 713(d)(1) called upon the Commission to exempt "by regulation" any "programs, classes of programs, or services" for which "closed captioning would be economically burdensome to the provider or owner of such programming" from any captioning schedule.

The legislative history of Section 713 further emphasized the need to balance the benefits of increased accessibility against economic realities. The Conference Report recognized "that the cost to caption certain programming may be prohibitive given the market demand for such programs and other factors," and went on

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3/ Section 305 of the Telecom Act was codified as Section 713 of the Communications Act of 1934, as amended. 47 U.S.C. § 713.

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to note that "the Committee does not intend that the requirement for captioning should result in . . . previously produced programming not being aired due to the cost of the captions." 4/ The Conference Report also reminded the Commission to "balance the need for closed captioned programming *against the potential for hindering the production and distribution of programming*." 5/ Based on this congressional balancing of public interest factors, the Commission was to adopt rules and timetables designed to move program distributors toward "full accessibility" at a pace that necessarily took into account marketplace realities.

The comments in the proceeding similarly underscored the potentially devastating impact of unreasonable captioning requirements and timetables on the cable industry. Parties as diverse as Viacom and C-SPAN addressed the importance of protecting young cable networks from the burdens of captioning until they have had a chance to develop a subscriber base. 6/ A number of parties also demonstrated that library programming, or programming made available prior to the effective date of any captioning rule ("pre-rule programming"), required more relaxed requirements than new programming lest such classic programming disappear from the U.S. video landscape. 7/

4/ H.R. REP. No. 204, 104th Cong., 1st Sess. (1995).

5/ Telecom Act, Joint Explanatory Statement of the Committee of Conference at 183 (emphasis added).

6/ *See Order* at ¶ 154.

7/ *See id.* at ¶¶ 53-54; A&E Comments at 22; ABC Comments at 10; CBS Comments at 7-8; National Cable Satellite Corporation ("C-SPAN") Comments at 9; GSN Comments at 3-5; Home Box Office ("HBO") Comments at 17, 20; National Cable Television Association Comments at 28.

The experience of the television broadcast industry with captioning prior to the Telecom Act also provided the Commission a context for formulating captioning timetables. Although television broadcast networks now caption a considerable amount of programming, progress in providing closed captioning did not happen overnight. The Commission first indicated a need to devote more attention to this issue twenty-seven years ago, 8/ and much existing captioning became available as a result of government support, support which would not be available for all programmers under a mandatory captioning regime. 9/

B. The *Order*

Despite the endorsement in the statute and its legislative history and the many comments in favor of the protection of new networks and library programming, the initial *Order* in this proceeding prescribes surprisingly demanding captioning schedules in these vulnerable categories of programming. By the year 2006, networks will be expected to caption 95 percent of all nonexempt programming, regardless of whether they are an established broadcast network or a fledgling cable network. Moreover, the *Order*, in a change from all prior indications of the Commission, demands that each channel show at least a certain fixed number of hours of captioned

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8/ *See* A&E Comments at 11 (citing *The Use of Telecasts to Inform and Alert Viewers With Impaired Hearing*, 26 FCC 2d 917 (1970)).

9/ *Notice* at ¶ 10. The Commission has recognized that the continuing availability of such funding "may affect the amount of closed captioning that can be provided." *Id.* at ¶ 46.

programming per quarter from 2000 to 2006, regardless of how many hours of new programming the network acquires.

The Commission attempted to reduce the regulatory burdens for certain programming and programmers by providing a number of key exemptions. These exemptions attempt to preserve programming that might otherwise be lost if not protected from the costs of mandatory captioning and to fulfill congressional intent by ensuring that captioning requirements do not diminish programming diversity. 10/ As petitioners note, however, these exemptions require some modifications in order to serve their intended purposes.

Programming on new cable networks is one such critical exemption. As noted, many parties had indicated that new cable networks, which typically take five years or more to break even, should not be expected to sustain the costs of captioning borne by established networks. 11/ In the *Order*, the Commission recognized that new cable networks merit an exemption from captioning requirements (the "new-network exemption"). 12/ The Commission, however, did not explain why it chose to limit the new-network exemption to only four years, why it denied new networks, once their exemptions expired, the transition period available to established networks, and why it permitted the exemption to begin to run even before the year 2000, when the first fixed-hour requirements apply. 13/ The period prescribed in the *Order* is tantamount to

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10/ *See, e.g.*, *Order* at ¶ 154.

11/ *See id.* at ¶ 91 & n. 284.

12/ *See id.* at ¶ 154.

13/ The *Order*, in relative part, reads as follows:

having no exemption at all, since the captioning obligation of the compliance schedule begins at the same time for both new and existing networks. Indeed, the rules may even be more onerous for new networks, since a fledgling network will be required to caption its programming at an accelerated rate once the "grace period" expires.

The Commission also sought to reduce the regulatory burdens of captioning on other programming types, such as library ("pre-rule") programming. Again, however, the *Order* does not adequately account for programming that the Commission expressly sought to protect in crafting the Captioning Rules. Although the *Order* prudently declined to set benchmarks for the captioning of pre-rule programming until the transition period for new programming has ended, the *Order* inexplicably protects only the programming -- and not the networks that rely heavily on such programming -- from the burdens of captioning. In fact, by requiring an absolute number of captioned programming hours per channel, the *Order* effectively discriminates against networks that air more library programming, because these entities will be forced to caption significantly larger percentages of their new

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> We conclude that an exemption based on years that a programming network has been in operation is more relevant than one that incorporates subscriber numbers . . . . Accordingly, a programming network will be exempt from our closed captioning rules for its first four years. The number of years will be calculated from the launch date of the network. A network must comply with the closed captioning rules once its exemption expires.

Id. The absence of a supporting rationale for the brevity of the new-network exemption, especially in light of the substantial reasons advanced during the comment period in favor of a longer exemption, *see, e.g.*, A&E Comments at 23-24, demands reconsideration.

programming in order to meet the *Order*'s hourly requirements. 14/ Consequently, though no percentage of library or pre-rule programming is required to be captioned until 2008, networks that intend to air substantial amounts of vintage programming nevertheless will be required to caption a disproportionate amount of new programming prior to that date in order to comply with the *Order*.

C. Petitions for Reconsideration of the *Order*

Several parties recently filed Petitions for Reconsideration that explicitly question the *Order*'s limits on the new-network exemption and the decision to require fixed amounts of captioned programming. Both Outdoor Life, which spoke for several cable networks, and GSN challenged the brevity of the new-network exemption and the *Order*'s refusal to grant new networks the same eight-year transition period granted to other networks. 15/ Outdoor Life and GSN both recognized that, without such changes, the new-network exemption cannot achieve the stated intent of the Commission: to protect the programming diversity offered by new networks by shielding new networks from captioning requirements until they can afford captioning. Outdoor Life also protested the *Order*'s unexplained shift to fixed hourly requirements of captioned programming during the transition period instead of a more equitable requirement that a certain percentage of nonexempt programming be captioned. 16/ GSN also

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14/ In extreme cases, the *Order* may even require a programmer to caption 95 percent of its new programming during the first year that the hourly requirements apply.

15/ *See* GSN Petition at 5-10; Outdoor Life Petition at 2.

16/ *See* Outdoor Life Petition at 10-11.

questioned the *Order's* approach to pre-rule programming, and it and ALTV recommended changes to aspects of those requirements. 17/

II. RECOMMENDATIONS FOR REVISION OF THE *ORDER*

A. The Commission Should Amend the Captioning Rules in Order to Provide A Realistic Transition Period for New Networks.

AETN agrees with various petitioners that new networks, once their exemption expires, should have at least as long as established networks to develop captioning for their programming. The timeline for all nonexempt programmers is straightforward: for two years, beginning in 1998, such a network need do no more than caption programming at its previous levels; for the next two years, it must caption at least 450 hours of non-exempt programming every quarter; for the next two years, an additional 450 hours of non-exempt programming per quarter; and for the next two years, yet another increase of 450 hours per quarter. Finally, eight years after the Captioning Rules apply to the network, the network must caption at least 95 percent of its nonexempt programming.

For a new network, however, the transition is not so gradual. The first year that a new network becomes subject to captioning requirements, it must caption as many hours as any other nonexempt network, even if it previously had not been required to caption a single hour. This sudden imposition of captioning requirements unfairly deprives new networks of the protection they merit from the burdens of

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17/ *See* GSN Petition at 14-17; ALTV Petition at 10-11.

captioning and should be reconsidered. New networks should have the same period enjoyed by established networks to prepare for the burdens of captioning. A new network, once its exemption expires, should have two years in which it may maintain its level of captioning, two years in which it must caption 450 hours of nonexempt programming quarterly, two years in which it must caption 900 hours quarterly, and two years in which it must caption 1350 hours quarterly, before it must be ready to caption 95 percent of its nonexempt programming.

Moreover, If a network qualifies for the new-network exemption when the Captioning Rules take effect, the transition to full captioning should not begin for at least five years. If the exemption remains limited to four years -- which is almost a year before most new networks can hope to become profitable -- the Captioning Rules are far more likely to damage the prospects for new networks seeking to expand the diversity of available programming. 18/

1. New networks require a transition period in which to implement captioning after their exemption expires.

Captioning is more than a mere matter of will. Considerable expense and operational planning are necessary if programmers are not to make programming choices based on the ease of or need for captioning that programming. Broadcast networks, with significantly larger annual revenues than the typical cable network, have had over 20 years to achieve their current level of captioning. Moreover, the Commission has granted established cable networks, which have a proven subscriber

18/ *See* Outdoor Life Petition at 2; A&E Comments at 23.

base, almost a three-year period in which to prepare their programming and operations for the first of the Commission's hourly captioning requirements. By comparison, the relative burden on new networks is far greater under the *Order*'s captioning regime. The *Order* effectively denies fledgling cable networks any gradual transition period to full captioning. When a new network's brief exemption from the Captioning Rules expires, that network may have to be prepared to caption 1350 hours (or more) of its programming overnight. The networks least able to absorb the costs of captioning thus will have the shortest time in which to prepare for those costs.

Inexplicably, the *Order* assumes that the exemption provided for new networks would serve as these networks' transition period. 19/ Compared to the time during which broadcast networks implemented captioning and the transition period for established cable networks before any hourly captioning requirements are enforced, a four-year captioning "transition" period for a new network is far too brief. More importantly, however, such reasoning contradicts the fundamental *raison d'être* that the Commission instituted the new-network exemption: *new networks cannot afford the costs of captioning during their first four years.* 20/

To expect a new network to begin captioning substantial programming during the period in which even the Commission is unwilling to burden them with the costs of any captioning is counterintuitive. The captioning timetable developed by the

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19/ *See Order* at ¶ 154.

20/ *See id.* at ¶ 154. ("We believe that the record supports the conclusion that new programming networks face significant start-up costs and that the additional costs of captioning could pose an economic burden that might deter entry by new networks.")

Commission will force new networks to begin gearing up for captioning essentially from the date of launch. Because new networks cannot gradually develop their captioning operations after their exemptions expire, the rules will immediately add the significant costs of captioning to the $100 million current price tag of a start-up network, an increase that the new-network exemption was intended to avoid. 21/

As several petitions for reconsideration recognize, the Commission should grant new networks the same effective transition period granted to established networks currently undergoing the transition to full captioning. Such a change will permit these networks to use their start-up exemption to accomplish that exemption's fundamental purpose: to develop an audience base sufficient to sustain the network, even with the additional costs of captioning. 22/ Otherwise, the captioning requirements risk causing the loss of networks and of programming choices for all viewers, a result directly contrary to the stated intent of Congress and the Commission.

2. The new-network exemption should protect new cable networks for at least five years from the beginning of hourly captioning requirements.

As the Commission is no doubt aware, cable networks do not have the financial resources of broadcast networks and are far less able to sustain the additional costs of captioning than broadcast networks. What the four major broadcast networks currently spend on prime time programming *in two weeks* would more than suffice to fund the similar programming of a cable network the size of the A&E network or The

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21/ *See id.*

22/ *See* GSN Petition at 10-13; Outdoor Life Petition at 12-14.

History Channel for an entire year. 23/ Accordingly, such networks should be accorded greater flexibility under the balancing factors established by Congress.

New cable networks, however, require particular solicitude. 24/ Even successful new networks that benefit from good name recognition and other advantages take almost five years after launch before they can hope to cover their costs *before* the additional expenses of captioning are added. 25/ The *Order*'s current four-year exemption does not even protect a fledgling network through this initial five-year period. 26/

When coupled with the *Order*'s refusal to grant any transition period to new networks once their exemptions have expired, the decision to grant only a four-year exemption becomes even more difficult to comprehend. No established network has had only four years in which to prepare to caption 450 hours (or 900 hours or 1350 hours or virtually all) of its new programming per quarter. What an established network

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23/ *See* A&E Comments at 14.

24/ As discussed previously in this proceeding, the FCC has acknowledged the special needs of new networks in crafting rules in many other contexts. *See* A&E Comments at 4-8. For example, the going-forward rules were modified specifically to ease the burden on establishing new networks. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* 10 FCC Rcd 1226 (¶ 22) (1994).

25/ *See* Outdoor Life Petition at 13.

26/ As noted, it is not clear on what basis the four-year exemption, rather than the five-year exemption largely endorsed by commenters, was selected. The *Order* did not explain the rationale for four, rather than five years, even though the evidence regarding new network's economic viability proffered in the comments underscored that five years would better conform to the economic realities of new cable networks. *See* *Order* at ¶ 91 n. 284.

has not done, a new, struggling network should not be expected to do. Moreover, by transforming the four-year exemption into a pseudo-transition period for the new networks, the exemption itself, as Outdoor Life explains, becomes illusory, and the supposed benefits for such an exemption disappear. 27/

Because a four-year period is too short to serve as both an exemption and a transition period, the Commission should toll all captioning requirements with respect to new networks until the onset of hourly captioning requirements, add a transition period for new networks, and extend the duration of the new-network exemption.

B. The Commission Should Restore the Proposed Percentage Benchmarks, Rather Than the Absolute Hourly Benchmarks Fixed in the *Order*.

Until the *Order*, the Commission described any captioning requirement during a transition period to full captioning as a percentage requirement: every two years, networks would be expected to increase by some fixed percent the amount of nonexempt programming they captioned until a specified percentage of programming was reached. 28/ That the *Order* abruptly replaced this percentage approach with fixed hourly amounts per quarter of captioned programming was unexplained. The Act and the Commission's *Notice* both indicate that the timetable for compliance must be realistic in light of the marketplace and existing obligations. Yet the shift to an hourly

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27/ *See* Outdoor Life Petition at 7-8.

28/ *See, e.g.*, *id.* at 10; *Notice* at ¶¶ 6, 41.

captioning requirement obliterates the distinction between new programming and library programming that Congress crafted in Section 713.

In addition, by adopting fixed hourly amounts, the *Order* imposes disproportionate burdens on networks that use greater amounts of library programming. Although the Commission explicitly refused to prescribe specific captioning requirements on pre-rule programming until ten years after the Captioning Rules became effective, 29/ the *Order* compels a network that relies on such programming to caption the same amount of programming hours as a network able to air all new programming (up to the 95 percent captioning ceiling). As demonstrated by Outdoor Life, this change penalizes new cable networks or networks that rely on vintage programming (which is often more costly to caption). 30/

The change also may contribute to the very problems that the Commission sought to reduce by the more gradual transition period for captioning pre-rule programming. In prescribing a more gradual transition for such programming, the Commission underscored that the lack of benchmarks for such programming would "alleviate some of the initial strain on captioning resources." 31/ Because all non-exempt networks will have to caption fixed hourly amounts of programming, regardless of their mix between exempt and non-exempt programming, the captioning

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29/ *See Order* at ¶ 62.

30/ Outdoor Life correctly notes that this abrupt departure from the *Notice* may cost networks hundreds of thousands of dollars *annually* during the transition period. *See* Outdoor Life Petition at 10-11.

31/ *Order* at ¶ 62.

industry will not enjoy any significant benefit from the varying transition schedules or exempted programming. Regardless of whether a network airs 500 hours of new, non-exempt programming (and the rest pre-rule) or 1500 hours of new, non-exempt programming (and the rest pre-rule), both, in the year 2000, will be required to have the same amount of programming captioned, and both will thus place the same burden on captioners. Such a result is contrary to the Commission's intent and to a sensible implementation of captioning requirements.

Because the Commission intended to protect new networks, classic programming, and the limited resources of the captioning industry through the new-network exemption and the longer pre-rule transition period, the absolute hours requirements should be replaced with percentage targets during the transition period.

III. CONCLUSION

Section 713 of the Telecommunications Act of 1996 contemplates that the Commission will consider the overall implications for the public interest in this proceeding. As it has done in the context of other recent regulatory initiatives, such as cable rate regulation and leased access, the Commission should be guided by economic realities in implementing rules and timetables for closed captioning for new cable networks. Although one petition for reconsideration appears to ask the Commission to further dilute the already feeble new-network exemption, 32/ and

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32/ *See* SHHH Petition for Reconsideration at 5-6 (filed Oct. 16, 1997). SHHH's proposal does not address the current formulation of the Captioning Rules. To the extent that the proposal is relevant, however, the emphasis it places on "phasing in" captioning obligations on a new network only underscores that a transition period for new networks after their exemptions expire is reasonable and necessary.

another demands even more burdensome captioning requirements in perpetuity, 33/ the reasoning of Outdoor Life and GSN confirms that a new network should be protected from the costs of captioning for at least five years once hourly requirements are imposed and should be permitted at least eight years thereafter before it is required to caption 95 percent of its nonexempt programming.

AETN urges the Commission to consider both Outdoor Life's and GSN's proposals and to adopt a new-network exemption that better accounts for the economic pressures faced by new cable networks and which would thus better preserve the survival of these sources of innovative and original programming.

Respectfully submitted,

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33/ *See* NAD and CAN Joint Petition for Reconsideration at 2-7, 23.

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